

This is our summary of some of the key legal developments across a range of sectors for the week of 25 January 2010. It is intended for reference purposes only and does not constitute definitive advice. Links to the original source materials are included where there are no restrictions in terms of access. References may also be made to sources that require separate registration or subscription. A link to a source does not necessarily imply endorsement of the source or the material provided through the link.

For further information on any of the matters discussed in the summary please contact our Professional Support Lawyer, [Sarah Kirkness](#). If you have any comments, queries or suggestions please contact us at [comments](#). All suggestions and comments are most welcome. If you do not wish to receive this summary you can contact us at [unsubscribe](#).

Speed Read

General

Update on Digital Economy Bill's Progress

ICO Warns on Consequences of Failure to Report Data Protection Breaches

New Legislation - Video Recordings (Labelling) Regulations

Draft Italian Decree Implementing AVMS in Breach of E-Commerce Directive?

Betting & Gaming

French Finance Committee Considers Censoring Unlicensed Online Gaming Operators?

EC Approves Acquisition of Mangas Gaming

Advocate General's Opinion on Use of Transitional Periods for Legislation on Betting Activities

Report Analyses Benefits to UK Economy from Betting Industries

Broadcasting

Broadcast Bulletin - Latest Issue

New Legislation - Community Radio (Amendment) Order

Corporate

ECJ Rules on Insider Dealing and What Constitutes "Use of Inside Information"

Quasi Partnership and Conduct of Affairs in Unfairly Prejudicial Manner - Section 994 Application

Film & TV

Communications Committee Reports on British Film and Television Industries

EC Approves State Aid for Spanish Film Industry

Litigation

Grounds for Continuing Injunction Against Publication of Confidential Information

Music

US District Court Amends Damages in RIAA File Sharing Case

US Department of Justice Settlement Agreement for Ticketmaster/Live Nation Merger

Beijing Court Rules Links in Search Results Do Not Infringe Copyright

Publishing

Working Group Announced to Consider Reform of Libel Laws

Times Appeal in Flood Online Libel Case

Consultations & Reports

General

Update on Digital Economy Bill's Progress

The latest "big news" in the ongoing debate surrounding the Digital Economy Bill has seen Financial Secretary to the Treasury Stephen Timms state that rights holders should pay 75% of charges arising from the Government's proposed clamp down on internet file-sharing, as they would be the "primary beneficiaries of the scheme". Internet service providers (ISPs) would therefore pay the remaining 25%. In response, the BPI said 75% per cent was not a "fair or proportionate allocation for rights holders". The Bill is still in the Committee stage before the House of Lords.

ICO Warns on Consequences of Failure to Report Data Protection Breaches

Legislation to provide the Information Commissioner's Office (ICO) with the authority to impose sanctions of up to £500,000 for serious breaches of the Data Protection Act come into force on 6 April this year. In the meantime, the ICO has warned organisations that they will need to take the requirement seriously or face "tougher regulatory sanctions". See http://www.ico.gov.uk/upload/documents/pressreleases/2010/data_breaches_260110.pdf for details; the ICO has also published a brief table which summarises the most common reasons for the breach (mistakes accounted for 195 of the 818 data security breaches reported to the ICO since November 2007; 262 breaches were the result of theft, often where the personal information was held on an unencrypted portable device).

New Legislation - Video Recordings (Labelling) Regulations

The Video Recordings (Labelling) Regulations 2010, SI 2010/115 came into force on 26 January 2010. The Regulations, which were made under section 8 of the Video Recordings Act 1984 as repealed and revived (and see last week's Need to Know for details), specify the various requirements for labelling video recordings, such as DVDs and videos, with information regarding their age classification. See http://www.opsi.gov.uk/si/si2010/pdf/ukSI_20100115_en.pdf for details.

Draft Italian Decree Implementing AVMS in Breach of E-Commerce Directive?

The European Commission has expressed concerns about a draft Italian law that will transpose the Audiovisual Media Services Directive into the Italian legislative system and amend the previous Television Without Frontiers Directive. However, in doing so the draft law is said to go against the terms of the E-Commerce Directive by placing a requirement on ISPs offering user-generated content to check that user-generated content is lawful before it is posted. Article 15 of the E-Commerce Directive states that "Member States shall not impose a general obligation on providers [...] to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity". According to reports, the draft law now requires only Presidential approval before it can become law and this approval is likely to be given next month. The Commission has indicated that it will take action, should this occur (Italy is most notable of all the Member States as regards the implementation of the AVMS).

Betting & Gaming

French Finance Committee Considers Censoring Unlicensed Online Gaming Operators?

The Finance Committee of the French Senate has reportedly introduced an amendment to the country's draft gaming bill which could see the censorship of search engines blocking the listing of unlicensed online gaming operators. All Bills tabled before the Senate are examined in detail by one of the Senate's Committees, which has the power to put forward amendments - the Remote Gaming Association has already said that it believes the draft bill remains "disproportionately restrictive and anti-competitive" and that it violates EU law by conferring significant economic advantages upon incumbent French operators. It said it would consider mounting a legal challenge if the French gambling bill was passed in its current form.

EC Approves Acquisition of Mangas Gaming

The European Commission has announced that it has granted clearance under the EU Merger Regulation to the acquisition of joint control of the leading French sports betting and online gaming group Mangas Gaming SAS (MG) by French companies Louis Dreyfus SAS (LD), Financieres Lov S.A.S. (Fin Lov) and Societe Anonyme des Bains de Mer et du Cercle des Etrangers a Monaco (SBM) of Monaco. LD trades in cereals and commodities, energy and property. Fin Lov is a holding company within the Lov Group, which is mainly active in audiovisual production, hotels, online gaming, power and online music promotion. SBM manages hotels, restaurants, casinos and property and is also active in online gaming. MG is an online gaming company. The acquisition was examined under the simplified merger review procedure. (*EC News Release EXME 10/ 27.01, 27 January 2010*).

Advocate General's Opinion on Use of Transitional Periods for Legislation on Betting Activities

Advocate General Bot of the European Court of Justice has given an opinion against the German prohibition of sports betting in a case involving Winner Wetten, confirming that the superiority of European law over national gaming legislation does not allow for any exception or transitional period to be applied. The Administrative Court of Köln had sought the ECJ's ruling on whether national governments were allowed to continue to apply, for a transitional period, gaming legislation that was not compatible with the freedom of establishment and freedom to provide services provisions as enshrined in Article 43 and Article 49 of the EU Treaty. The Opinion confirmed that there are no legal arguments to allow for an exception to the direct application of the Treaty to the gaming and betting sector. It said "A court of a Member State cannot continue to apply its national legislation on sports betting for a transitional period by way of exception if that legislation constitutes an unjustified restriction of the freedom to provide services in that it does not serve to limit betting activities in a consistent and systematic manner. The ECJ has still to rule on the matter however. (*Winner Wetten GmbH v Bürgermeisterin der Stadt Bergheim, Case C-409/06* - see <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en&alljur=alljur&jurcdj=jurcdj&jurtpi=jurtpi&jurtfp=jurtfp&numaff=C-409/06&nomusuel=&docnodecision=docnodecision&allcommjo=allcommjo&affint=affint&affclose=affclose&alldocrec=alldocrec&docor=docor> for the Opinion).

Report Analyses Benefits to UK Economy from Betting Industries

Bookmaker Ladbrokes, which recently commissioned a report by Deloitte on the economic contribution of the betting industry to the British economy, has summarised the results. The report reveals the total contribution to the British economy from the British betting industry to be £6 billion (in Gross Value Added (GVA) terms) with 100,000 jobs, which is equivalent to 0.5% of GDP and 0.3% of total employment. The British betting industry is responsible for a direct contribution of £3 billion in GVA terms and 40,700 full time equivalent jobs. Further, it shows that betting has a regeneration impact because the high levels of footfall associated with betting shops help attract consumers to other retail businesses and generate critical mass effects and that 15% of horse racing's annual income is derived from the betting industry. (*Ladbrokes Company News Report, 26 January 2010*).

Broadcasting

Broadcast Bulletin - Latest Issue

The latest issue of Ofcom's Broadcast Bulletin has been published with details of adjudications on breaches of Rules 1.14 (the most offensive language must not be broadcast pre-watershed), 2.1 (generally accepted standards), 2.13 (broadcasters must maintain low risk levels for PSE sufferers) and 10.2 (advertising and programming elements of

programmes must be kept separate) of the Broadcasting Code. Ofcom also recorded a breach of Licence Condition 11 (retention and production of recordings). See http://www.ofcom.org.uk/tv/obb/prog_cb/obb150/Issue150.pdf for details.

New Legislation - Community Radio (Amendment) Order

The Community Radio (Amendment) Order 2010, SI 2010/118 came into force on 22 January 2010. The Order amends aspects of the existing community radio licensing regime, as set out by the Community Radio Order 2004 so as to give Ofcom powers to grant a one-off five year extension to community radio licences; allow community radio stations to obtain more than 50% of their revenue from one source (however, advertising and sponsorship restrictions will continue to apply); allow Ofcom to award a licence to a community radio station when it would overlap with a small commercial station with a potential audience of less than 50,000 adults; and clarifies that Ofcom is not required to conduct an economic viability assessment with regard to a community radio service when deciding whether, and on what terms, to grant a licence for another community radio service. See http://www.opsi.gov.uk/si/si2010/pdf/uksi_20100118_en.pdf for details.

Corporate

ECJ Rules on Insider Dealing and What Constitutes "Use of Inside Information"

The European Court of Justice has considered the expression "use of inside information" in Article 2(1) of the Market Abuse Directive 2003/6/EC. The reference was made in the course of proceedings between Spector Photo Group NV and one of its managers, Mr Van Raemdonck and the Commissie voor het Bank-, Financier- en Assurantiewezen (Commission for Banking, Finance and Insurance) (CBFA), which had imposed fines on the former two parties for insider dealing. The court said that on a proper interpretation of Article 2(1) of the Directive, the fact that a person in possession of inside information, "acquires or disposes of, or tries to acquire or dispose of, for his own account or for the account of a third party, either directly or indirectly, the financial instruments to which that information relates implies that that person has 'used that information' within the meaning of that provision", but without prejudice to the rights of the defence and, in particular, to the right to be able to rebut that presumption. The referring court had also asked whether, in order to sanction insider dealing while respecting the principle of proportionality, it was necessary to take account of the gains realised, and if so, what date should be taken as the basis for gauging those gains. It said "gains realised from insider dealing may constitute a relevant element for the purposes of determining a sanction which is effective, proportionate and dissuasive". The method of calculation of those economic gains and, in particular, the date or the period to be taken into account were to be determined by national law. (*Spector Photo Group NV & v Commissie voor het Bank-, Financier- en Assurantiewezen (CBFA)*, Case C-45/08 - see <http://www.bailii.org/eu/cases/EUECJ/2009/C4508.html> for the judgment - note that the European Commission is currently conducting a review of the Market Abuse Directive).

Quasi Partnership and Conduct of Affairs in Unfairly Prejudicial Manner - Section 994 Application

The petitioner applied for relief under section 994 of the Companies Act 2006, alleging that the affairs of the third respondent company had been conducted in a manner unfairly prejudicial to his interests as a member, and asking for an order that either the first respondent or the second respondent buy out his shares at a value determined as at the date of his exclusion from the management of the company (the retrospective valuation was material because the company's fortunes had "declined to the point where it was put into administration"). The petitioner said after he acquired the shares, the company had become a quasi partnership between himself and the first respondent. He contended that it had been agreed that he would participate in managing the company's affairs and that he and the first respondent would divide the profits equally between them, drawing equal amounts of cash as payments on account of dividends to be declared at the year end. He alleged, however, that he had been expelled from the company, that no dividends had been declared, and that he had been left with a substantial debt in respect of the payments received on account of dividend and that the first respondent continued to run the company and to draw large amounts of cash. The High Court noted that if "company falls into this quasi partnership category, the court is more likely to conclude that it is unfair to fail to give effect to, or bring to an end, arrangements which have been made on an informal basis, even though they do not give rise to legal entitlements, or to exclude a participator from the management or conduct of the company's business, if it was part of the arrangement that he should take part in it" and that the appropriate question was whether the company had become a quasi partnership by the time the relationship between the petitioner and the first respondent reached its fully developed form. The court found, judging the overall totality of the evidence, that the affairs of the company had been conducted in a manner unfairly prejudicial to the petitioner's interests as member - the parties had come to "have a relationship which was a personal one rather than a purely commercial one. Insofar as the necessary character of the relationship is referred to in the authorities as one of mutual trust and confidence, in my view what is meant by that is a relationship which requires those qualities for it to work as intended" and the

petitioner's "expulsion from the Company was ... prejudicial to his interests as member, in that it prevented him from participating in the management of the Company, and from contributing to the generation of sales which would lead to profits in which he would share by way of dividend, that is to say in his capacity as member. It was unfair given that I have concluded that the Company had become a quasi partnership and that his participation in its business was part of the agreed basis of operation". The court said it was appropriate that any order to buy the petitioner's shares should be on the basis of a valuation that is not discounted because his holding is a minority. (*Croly v Good & Ors* [2010] EWHC 1 (Ch) - see <http://www.bailii.org/ew/cases/EWHC/Ch/2010/1.html> for the judgment).

Film & TV

Communications Committee Reports on British Film and Television Industries

The House of Lords Communications Committee has published the results of its investigation into the British film and television industries. The Committee had a "very broad remit" - to look at how the film and broadcasting industries were supporting the UK economy, including jobs, promoting UK culture and talent, whether there was scope for them to make a greater contribution and what more could be done by Government and other parties to help support them. The Committee began by recognising the important contribution the film and television industries make to the UK and the variety of tools the Government has sought to use to support it, including quotas, levies and tax incentives while also noting the differences between the way in which US companies have been able to finance their productions. The Committee suggested some "adjustments" be made to the aid to smaller films and films made abroad and said that despite the various support measures, independent filmmakers still faces financial difficulties - they therefore recommended that the Government "consider ways of encouraging private investment in film production". Further, the Committee questioned "whether an industry body like the UK Film Council should be substantially financed by the Lottery rather than direct Government support" and said they regretted the reduction in funding because of the demands of the 2012 Olympic Games and recommended that the funding level should be restored immediately after 2012/13. They also questioned whether the "small saving" justified the proposed merger of the UK Film Council and the BFI (which is currently under consideration by the DCMS). On the risks posed by illegal file sharing the Committee said that given the strength of film industry concern about the threat from audiovisual piracy, they supported the Government's decision to introduce regulatory measures to combat unlawful peer-to-peer file sharing. The Committee noted that while Digital Britain states that, "in relation to rights, the Government believes piracy of intellectual property for profit is theft and will be pursued as such through the criminal law" they said they remained concerned that the law was unclear and provided "insufficient deterrent to abuse". They recommended that the Government "reconsider the case for specific legislation to make it a criminal offence to record a film in a cinema by camcorder". Not surprisingly the Committee spent some time considering the issues facing the production and distribution of UK-originated content for television - they recognised the pressures facing commercial PSBs and looked at the ways the serious decline in investment could be reversed. They said "Despite the BBC Trust's apparent intention to prevent changes in BBC Worldwide ownership structure, we are convinced that the growth of BBC Worldwide through introduction of private capital will benefit UK content producers and UK exports". Accordingly they said they support the Government's intention to sell a part of BBC Worldwide, creating a public private company. They said they "believe that such a company, with a continuing link to the BBC, would be capable of becoming a major global brand for distributing UK content, producing additional profits, employment and opportunities for British production companies". They also recommended the extension of the film tax credit, on a pilot basis, to children's programmes and animation productions made for television and suggested that the pilot, if successful, might be extended to other genres but noted that given the current financial constraints on the commercially-funded PSBs, it was not realistic to introduce quotas on specific genres of television programming. They also noted that "There is a serious risk that the UK will lose out by the decision to block Project Kangaroo and we strongly regret the Government's failure to intervene in the Competition Commission's investigation". They urged that, if other similar UK-based video on demand projects are proposed, "the Government will ensure that the implications for the British television industry are properly taken into account". Finally, the Committee made a number of recommendations to support investment skills and training. See <http://www.publications.parliament.uk/pa/ld200910/ldselect/ldcomuni/37/3702.htm> for access to the various sections.

EC Approves State Aid for Spanish Film Industry

The European Commission has announced that it has approved under EU state aid rules a €576 million Spanish film support scheme, which will run until 31 December 2015. The scheme will apply to Spain's national film support measures including film production and distribution. The Competition Commissioner said "This scheme should improve the visibility and popularity of Spanish independent films, not only in Spain but worldwide" - the selective support is intended to sustain arthouse films while the automatic, audience-based support aims to encourage

independent producers to make better-financed films rooted in Spanish/European culture. In 2008, US films accounted for 71.5% of the Spanish market. (*EC Press Release IP/10/57, 27 January 2010*).

Litigation

Grounds for Continuing Injunction Against Publication of Confidential Information

The claimant local authority had successfully applied for an order made without notice restraining the defendant television corporation (the BBC) together with any other person who was served with or had notice of the order from publishing any information obtained from the serious case review (SCR) or executive summary of the circumstances leading to various "unusually serious" offences that had been committed by two 11 year old boys under section 18 of the Offences Against the Person Act 1861 and which had been the subject of extensive coverage and comment. The claimant brought an application to continue the order - in refusing the application the court said there was "no evidence before the court that there is or has been a threat by the BBC to publish confidential or private information" and that on that ground the application must fail. It said further, "There may well be confidential information in the SCR, but if there is, the fact that the BBC has had access to it is not a sufficient basis for granting an injunction against the BBC. There must be evidence of a threat to publish confidential information". (*Doncaster Metropolitan Borough Council v British Broadcasting Corporation [2010] EWHC 53 (QB)* - see <http://www.bailii.org/ew/cases/EWHC/QB/2010/53.html> for the judgment - the judgment also made much of the "lamentable omissions" by the claimant in respect of the proper rules of procedure - the court noted that it had not made the order it did as a result of the claimant's failure to follow correct procedures but said instead that if they had been followed, it would have been apparent that no injunction was required).

Music

US District Court Amends Damages in RIAA File Sharing Case

A Federal Judge in the US District Court (District of Minnesota) has reviewed the ruling in *Capitol Records v Thomas-Rassett*, concurring that some penalty should exist for the file sharing offences but also noting that it was unfair for two separate juries to impose such significant damage awards upon a file-sharing defendant. When the first jury in the case imposed statutory damages of \$9,250 per song, the judge said in dicta that a reasonable jury could have imposed a statutory damage award of no more than \$250/song. The judge said damage awards "must bear some relation to actual damages" and said that the "reduced award is significant and harsh" but it is "no longer monstrous and shocking". According to reports, the judge declined to rule on the defendant's argument that the Copyright Act in the file-sharing context was unconstitutional but instead exercised "remittitur" and reduced the jury's damages award on the grounds that there was no rational basis for the jury to have reached its decision. The judge said "The need for deterrence cannot justify a \$2 million verdict for stealing and illegally distributing 24 songs for the sole purpose of obtaining free music" - the new damages amount to three times the minimum of \$750 damages the Copyright Act allows (\$54,000, or \$2,250 per song). In addition, Thomas-Rassett was ordered to never infringe the music industry's copyright again and to destroy music she had obtained illegally. The RIAA then wrote to the defendant, reiterating the judge's comments about the "serious widespread harm caused to the music industry" by her actions but offering to reject the court's remitter if an alternative resolution could be found - that resolution took the form of a reduced settlement payment of \$25,000 (which would then be donated to an agreed music charity) with the parties each bearing their own costs. The defendant reportedly rejected the offer and the matter will now be set down for trial (again).

US Department of Justice Settlement Agreement for Ticketmaster/Live Nation Merger

The US Department of Justice (DoJ) has announced that it has agreed a settlement in the proposed acquisition of Live Nation by Ticketmaster, which requires Ticketmaster to "license its ticketing software, divest ticketing assets and subject itself to anti-retaliation provisions in order to proceed". The DoJ said, "the proposed settlement will protect competition for primary ticketing, which will in turn maintain incentives for innovation and discounting". The DoJ also said that the merger, as originally proposed, "would have substantially lessened competition for primary ticketing in the United States, resulting in higher prices and less innovation for consumers". The ticketing assets must be divested to two different companies - Anschutz Entertainment Group (AEG) and either Comcast-Spectacor or another buyer suitable to the department, respectively, allowing both companies to compete head-to-head with Ticketmaster. Ticketmaster must also divest Paciolan Inc., a ticketing company that it currently owns, within 60 days to either Comcast-Spectacor, which has already signed a letter of intent to purchase the assets, or some other buyer suitable to the department. Under the terms of the settlement, the merged firm will be "forbidden from retaliating against any venue owner that chooses to use another company's ticketing services or another company's promotional services, including restrictions on anticompetitive bundling". The merged firm must also allow any client that leaves and chooses to use another primary ticketing service to take a copy of the

ticketing data related to that client's sales. The merged firm must also provide notice of any other acquisitions of a ticketing company so that the DoJ may investigate the competitive effect of such an acquisition. See <http://www.justice.gov/opa/pr/2010/January/10-at-081.html> for details.

Beijing Court Rules Links in Search Results Do Not Infringe Copyright

Beijing's No 1 Intermediate People's Court has given its ruling in the action brought by the International Federation of the Phonographic Industry (IFPI) representing music companies Universal Music, Sony Music Entertainment (formerly Sony BMG Music Entertainment [Hong Kong]) and Warner Music against search engine Baidu. The IFPI began proceedings against Baidu in 2008 after it said negotiations to resolve concerns with the search engines deep-linking practices had not resulted in the matter being satisfactorily resolved and that the search results contained links to illegal file sharing sites which facilitated illegal downloading and copyright breaches. The Beijing Court ruled however that merely providing search results did not qualify as an infringement. It said that the IFPI had failed to identify any of the sites that were allegedly hosting the illegal music and Baidu itself was not hosting the songs. Therefore, merely providing search results to users wasn't sufficient to contravene copyright law. The IFPI described the ruling as "extremely disappointing".

Publishing

Working Group Announced to Consider Reform of Libel Laws

The Lord Chancellor and Secretary of State for Justice has announced the formation of a "working group" which has been tasked with the job of considering whether the law of libel, including the law relating to libel tourism, in England and Wales needs reform, and if so making recommendations as to solutions. The announcement by the Secretary of State also said that while the scope of the group's considerations will extend to all aspects of substantive libel law in England and Wales, it exclude issues relating to costs in defamation proceedings, where work is already underway. The group has been asked to make its recommendations by March - see <http://www.justice.gov.uk/latest-updates/announcement270110a.htm> for details.

Times Appeal in Flood Online Libel Case

The Times newspaper has reportedly obtained permission to appeal on a point in its qualified privilege defence in a libel action brought by Metropolitan Police detective sergeant Gary Flood in relation to a story which said he was being investigated in connection with bribery allegations - it was said that he had taken money from some of Russia's most wanted suspected criminals in return for selling them highly confidential Home Office and police intelligence about attempts to extradite them to Russia to face criminal charges. The paper did not publish the outcome of the investigation, which had cleared him and left its original article online. The judge held that "responsible journalism required" that the newspaper should have published an update to the story on the website from that date. The article in question was available online between June 2006 until September 2007 - the paper argues that it should be sufficient, in cases involving litigation, simply to put a marker on a story saying that it is the subject of an action.

Consultations & Reports

Ofcom Notice - Notice of Proposed Changes to Satellite Services Licences Resulting from the AVMS Directive - http://www.ofcom.org.uk/consult/condocs/satellite_services/condoc.pdf (Ofcom's Statutory Notice sets out details about the changes to Satellite Services Licences for permanent (PES) and transportable (TES) earth stations that are being proposed to enable Ofcom to secure compliance with legislation implementing the Audio Visual Media Services (AVMS) Directive).